Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 29, 1998

Ms. Lavergne Schwender
Assistant County Attorney
Harris County
602 Sawyer, Suite 710
Houston, Texas 77007

OR98-2549

Dear Ms. Schwender:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119518.

The Greater Harris County 9-1-1 Emergency Network (the "Network") received a request for various information related to the Network's "implementation of E-9-1-1 cellular phone technology within Harris County," including contracts between the Network and a company named TruePosition. Another request seeks only contracts existing between the Network and TruePosition. You submit a contract between the Network and TruePosition as responsive to the requests, but seek to withhold the contract under section 552.110 of the Government Code. Pursuant to section 552.305 of the code, this office notified TruePosition of the requests and TruePosition has also submitted arguments that the requested contract is protected from disclosure by section 552.110.

Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a

> process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).[1]

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). To prove substantial competitive harm, the party seeking to prevent disclosure must show

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[1]These six factors are:

1) the extent to which the information is known outside of [the company's] business;

2) the extent to which it is known by employees and others involved in [the company's] business;

3) the extent of measures taken by [the company] to guard the secrecy of the information;

4) the value of the information to [the company] and to [its] competitors;

5) the amount of effort or money expended by [the company] in developing this information; and

6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

TruePosition claims protection for the entire contract as both a trade secret and confidential commercial or financial information under section 552.110. We do not believe that its arguments for withholding the contract under the trade secret prong of section 552.110, however, sufficiently address why specific portions of the contract should be considered trade secrets. We note the observation in Open Records Decision No. 514 (1988) that it is not "clear whether the general terms of a contract with a state agency could ever constitute a trade secret." See also Gov't Code §552.022(3) (information in a government contract is public "if the information is not otherwise made confidential by law"). Much of the contract information appears to relate to "single or ephemeral events in the conduct of the business" not "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 (quoted above). *See e.g.* TruePosition's September 4, 1998 brief, at 10 ("TruePosition agreed to concessions that it considered appropriate in its agreement with the Network, which it would not consider appropriate or acceptable for subsequent purchasers.") Since in our opinion, TruePosition has not made even a *prima facie* showing that any portions of the contract are "trade secrets," we conclude that the contract may not be withheld under the "trade secret" prong of section 552.110.

With respect to the second prong of section 552.110, commercial or financial information, TruePosition argues that the contract meets the test for withholding under *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993), for information that is "voluntarily" submitted to the government. Under *Critical Mass,* the test for withholding is that the information voluntarily submitted be of a kind that the provider would not customarily make available to the public. *Id.* In our opinion, the proper test for withholding the contract here under the commercial or financial branch of section 552.110 is that set out in *National Parks v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See McDonnell Douglas Corp. v. National Aeronautics and Space Administration*, 895 F. Supp. 316, 318 (D.D.C. 1995) (information submitted to win a government contract is not "voluntarily" submitted). In *National Parks*, the court concluded that for information involuntarily submitted to be excepted under exemption 4 to the federal Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *See* Open Records Decision No. 639 (1996).

We note specifically with regard to TruePosition's claim that pricing information in the contract is protected commercial or financial information, that federal cases applying

the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) at 6; *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). The public has an interest in knowing the prices that a government contractor charges. We do not believe that TruePosition's showing here, that release of the pricing information would injure it, offsets the public's interest in disclosure of this information. Similarly, TruePosition's allegations that release of technical information in the contract would harm it do not, in our opinion, offset the public's interest in knowing the details of what goods and services the governmental body has acquired with public funds.[2] In our opinion, the public interest in disclosure of the contract information outweighs the harm that True Position has shown it would suffer by release of the information.[3] Consequently, the contract at issue must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

William Walker
Assistant Attorney General
Open Records Division

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[2]We note that the requestor here, AT&T Wireless Services, points out in its brief in this matter that True Position's allegations that it "protects the intellectual property embodied in the System using a combination of patent and trade secret protection" is, with respect to patent protection, inconsistent with its confidentiality claims, citing Luccous v. Kinley, 376 S.W.2d 336 (Tex. 1964) (condition of patent claim is that patented information is made public).

[3]We note that the Network argues that the contract may be withheld under the commercial or financial prong of section 552.110 because release of certain information therein – "essentially the cost concession provisions"-- "would compromise government's commercial opportunities and government's ability to obtain such financial/commercial benefits in the future." The Network's arguments, in our opinion, do not relate to the *National Parks* test for withholding, *i.e.* that release of information would impair the government's ability to obtain necessary information in the future. *See* Open Records Decision No. 514 (1988) (that release of contract would impair agency's publication project is not the equivalent of impairing its ability to "obtain information" under the *National Parks* test).

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Enclosures: Submitted documents

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(w/o enclosures)